

United States 9

# Circuit Court of Appeals

For the Ninth Circuit.

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FRANK ALIOTO, et al.,

Appellants,

vs.

L. A. PEDERSEN,

Appellee.

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## Apostles on Appeal.

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
First Division.

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FILED

APR 12 1919

F. D. MONCKTON,  
CLERK.



No. 3320

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Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the Southern Division of the District Court of the  
United States, in and for the Northern District  
of California, First Division.*

IN ADMIRALTY.

FRANK ALIOTO, F. G. A. AIELLO, GIACOMO  
AIELLO, Santa Alia, Tony Aello, G. Aiello,  
Bruno Aiello, Domenico Aiello, Salvatore  
Accetta, C. Aiello, S. Aiello, Matteo Asaro,  
Girolamo Amenta, Frank D. Aiello, Carmelo  
Amenta, Calofirobuscemi, G. Belleci, Salvatore  
S. Bruno, Giacommi, A. Buffi, O. Bagnio, Peter  
Beleci, S. Bologna, Matteo Bologna, V. Bel-  
lici, Paul Aiello, V. Bellici, V. Brocato, Bene-  
detto Brugato, S. Bologna, Joe Bellici, S.  
Bologna, Paolo Bellici, C. Cardinali, P. Cav-  
allo, A. Cardinale, S. Cardinale, Paola Costa,  
G. Castanza, D. Caccianouva, S. L. Conti, F.  
Constanza, G. Carmelo, D. Cassalnuovo, Liugo  
Casalnuovo, G. Carnullo, G. Campagno, N. Ca-  
taldo, G. Catholico, E. Cardinale, I. Canepa, F.  
Cardinale, A. Costanza, G. Costanza, G. Ce-  
celio, Augustino Cecelio, A. Davi, F. Con-  
stanzo, G. Di'Maggio, F. Di'Maggio, G. Dom-  
inico, Sal Di'Franko, F. Di'Grande, M. Del-  
camo, G. Di'Maggio, B. De'Listo, A. R. De'-  
Guisseppe, G. Di'Angelo, L. G. Danela, A.  
Dominick, Fran Digrande, F. Evola, Gaitano,  
John Erickson, A. Fede, Matteo Ferrara, G.  
Flores, P. Flores, Luigo Flores, A. Flores, G.  
Facciendi, S. Garlino, Nick Gervasi, C. Garde-

cini, G. G. Guisseppe, G. Gombala, Ivar Helset, Ole Hagen, J. Iello, V. Intravia, Ed. Johanes-  
 sen, Ed. Johanessen, H. Johansen, S. Bruno, V. Lafrancesco, G. Corrunzzan, Z. Lombardi, R. Lucido, A. C. Lucido, F. Lombardo, V. La'-  
 Francesco, M. Lucido, B. Labruzzo, E. Lucido, V. Lombardo, E. Lucido, A. Mortensen, Joe Manescalca, Alfredo Martel, V. Muscato, G. Minea, A. Malampo, G. Magniffo, D. Napoli, T. Ningacia, Nels Nelson, F. P. Navaro, Sven Odland, Sven Olsen, S. Patania, S. Piro, Sal-  
 vatore Partinigo, N. Patrici, Francisco La'-  
 Paolo, S. Lucinto, G. Piazza, Jos. Pepetone, Frank Peralto, A. Palma, William Penny, A. Johnson, R. Paulsen, Albert Eastling, Ed. Gustafson, Melmer Olson, A. Rundstrom, John Lundval, Christ Hansen, K. P. Moines, John Valgren, Ben Swanson, Arthur Johan-  
 esen, B. Lysbro, Ole Hagen, Martin Swanson, A. Renwall, A. C. Russo, A. Russo, Salvatore Russo, Guisseppe Russo, G. Russo, Natale Russo, A. Russo, S. Russo, Paolo Rizzo, Narvo Russo, D. Russo, S. Russo, V. Romeo, S. Rubino, B. Sabella, F. Storelli, R. Storelli, F. Streppa, T. Sebastiano, Augusto D'Santo, V. Smaline, A. Sarmebi, N. Sebastiano, An-  
 tonio Sposito, S. Sancimino, A. Satmedi, Jow. Silva, S. Sammatini, F. Sicilia, V. Salvi, Thore Strand, G. L. D. Salvatore, Tony Lazio, Tonder Strand, Peter Metbush, Alf. Sancimino, Christo Svidese, G. Sonato, B. Torenti, B. Tringali, A. Verduci, F. Ventimiglia, S.

Verduci, Ole Wewang, John Quori, Guiseppe Zanti, Sebastiano Tringali, Guiseppe Ternullo, J. Zhndi, Sam. D. Augustin, P. Nazzarini, P. Cashino, C. Buscenni, F. Mellic, G. Stores, John Vinari, Henning Bergstrom, Mike Pricia, S. Gianio, Salvatore Gulino, M. Guzzetta, F. H. Haynes, G. A. Johnson, M. Lafato, Formica Natale, R. Pisciotto, Peter Pedersen, R. Reinertsen, Alex. Secreto, F. Savalli, Gunder Svenson, John Trapani, and Anders E. Andersen,

Libelants,

vs.

L. A. PEDERSEN,

Defendant.

**Libel.**

[5\*]

To the Honorable M. T. DOOLING, Judge of the Above-entitled Court.

The libel of the libelants above named, against L. A. Pedersen, libelants, being seamen and fishermen of said district, and said Pedersen being a ship owner and operator and salmon canner, also of said district, alleges as follows, in a cause of wages, civil and maritime:

I.

That heretofore and during the month of May, 1918, libelants were each hired by said L. A. Pedersen at the port of San Francisco, in the State of California, to proceed thence to the Kwichak River in Alaska, and there catch salmon to be delivered to him

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\*Page-number appearing at foot of page of original certified Apostles on Appeal.

on lighters at said place, and he agreed to pay said libelants each three and one-quarter ( $3\frac{1}{4}$ ) cents for each Red or Coho salmon offered for delivery to him on his lighters at said place by said libelants respectively.

## II.

That pursuant to said hiring libelants each signed shipping articles before the United States Shipping Commissioner at the Port of said San Francisco, prior to their departure therefrom for said river in Alaska, that the said shipping articles contained among other things the following:

“Each Bristol Bay cannery shall employ no less than three beachmen for every line of canning machinery for tall cans operated.”

## III.

That defendant had eight lines of canning machinery and employed at no time in excess of seventeen men, to wit, beachmen, and his said machinery was defective in this, that it was constantly getting out of order, and for that reason defendant was unable to take from libelants fish as they caught them and their boats in which they caught salmon were detained in deliveries, and at no time was defendant able to take from libelants or any thereof salmon in excess of 1,220 fish (salmon) per day, when if he had had proper machinery and a sufficient number of beachmen to operate the same he would have been able to have taken at least 1,500 per day for 30 days, and each of the libelants [6] would have earned \$292.50 under said contract of hiring for salmon acceptable to defendant, that they each would have

caught, to wit, Red or Coho salmon, during thirty days of the time they fished for said defendant at said place under said contract, if he had had proper machinery and a proper number of men to operate the same while libelants were fishing for him as aforesaid.

#### IV.

That it is further provided in said shipping articles as follows:

If any boat is detained from delivering salmon at receiving station for six hours after arrival, such boat shall be credited with twenty-five per cent (25%) additional salmon over and above the number delivered from it, and for each further hour's delay, an additional credit of twenty-five per cent (25%) shall be given. Boats to report at time of arrival at receiving station. The same rule to apply when boats are on the limit. Boats must have nets cleared before arriving at fish receiving station.

That the limit above mentioned is an obligation under said contract of hiring on the part of defendant to pay for at least 1,200 salmon every twenty-four hours, whether he took the same or not. It was further provided in said contract of hiring as follows:

“All salmon must be in perfect condition and not discolored on the outside and must be discharged from boats at least once in twenty-four (24) hours.”

#### V.

That while salmon caught by the libelants were undischarged from their fishing boats, they were com-

pelled to stay in such boats and were unable to obtain sleep or attend to each of their personal wants, or necessities, and that among other reasons was the cause of said matters being inserted in said contract of hiring, also to prevent such salmon as were caught by libelants from becoming spoiled by reason of not being discharged and canned in proper time.

#### VI.

That on the 5th day of July, 1918, libelants each tendered to defendant at his cannery as aforesaid, in their respective fishing boats, each of such boats having its nets cleared, said tenders being made at defendant's receiving station on said river in [7] Alaska, each 1,200 Red or Coho salmon, in perfect condition, not discolored on the outside or at all, but defendant by reason of his lack of beachmen as aforesaid, and his said imperfect canning machinery, was unable to and did not take the same from said boats for the period of twenty-four hours thereafter, to wit, said boats were not discharged at all on said July 5th, but on July 6th, 1918, that by reason of the premises each of the libelants were entitled to be credited by the defendant with 5,700 Red or Coho salmon at the value of three and one-quarter cents each, and so be paid, but defendant has refused to credit them with any number in excess of 1,200 each, and such Red or Coho salmon in number 4,500 Red or Coho salmon, in value \$146.25 to each of the libelants, defendant has refused to either credit each of the libelants with or to pay any of the libelants therefor or any part thereof, and the whole of said sum remains unpaid.

## VII.

That a reasonable compensation to each of the libelants under the said contract of hiring depended upon defendant taking from each of the libelants all of the Red or Coho salmon that each could catch at said river, and that defendant would do so was the principal inducement for each of the libelants entering into the said contract of hiring.

## VIII.

That by reason of the premises, libelants are each entitled to have and recover of the defendant the sum of four hundred and thirty-eight and 75/100 (\$438.75) dollars, none of which has been paid.

## IX.

Libelants allege that it would be and was and is impractical or extremely difficult to fix the actual damages suffered by each of the libelants by reason of the failure of defendant to take from them the salmon tendered by each of the libelants to defendant on the 5th day of July, 1918, and his not taking them until the 6th day of July, 1918. [8]

## X.

That said Kwichak river in Alaska is on Bristol Bay, Alaska, and the cannery of defendant where libelants worked for him is what is known as a Bristol Bay Cannery, and was such and so known at all of the times herein stated.

## XI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelants pray that process in due form

of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said defendant L. A. Pedersen, and that he may therein be cited to appear and answer under oath all and singular the allegations aforesaid, and that libelants may have such other and further relief as the Court is competent to give in the premises.

R. PAULSEN,  
Libelant.

All of the Other Libelants in the Caption  
Hereof Named.

By H. W. HUTTON,  
Their Proctor.

H. W. HUTTON,  
Proctor for Libelants.

United States of America,  
Northern District of California,—ss.

R. Paulsen, being first duly sworn, deposes and says as follows: I am one of the libelants above named; I have read the foregoing libel and I know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated on information or belief, and as to those matters I believe it to be true.

R. PAULSEN.

Subscribed and sworn to before me this 9th day of  
October, 1918.

[Seal] MARGUERITE S. BRUNER,  
Notary Public in and for the City and County of San  
Francisco, State of California.

[Endorsed]: Filed Oct. 17, 1918. W. B. Maling,  
Clerk. By T. L. Baldwin, Deputy Clerk. [9]

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*In the Southern Division of the United States Dis-  
trict Court, for the Northern District of Califor-  
nia, First Division.*

IN ADMIRALTY—No. ———.

FRANK ALIOTO et al.,

Libelants,

vs.

L. A. PEDERSEN,

Defendant.

**Exceptions to Libel.**

To the Honorable MAURICE T. DOOLING, Judge  
of the Above-entitled Court:

The exceptions of the defendant, L. A. Pedersen,  
to the libel herein, alleges as follows:

I.

That said libel does not state facts sufficient to  
constitute a cause of action against this defendant,  
in favor of any of the libelants therein named.

II.

That the first alleged cause of action in said libel,  
set forth in paragraphs I, II and III thereof, does  
not state facts sufficient to constitute a cause of action  
against this defendant, in favor of any of the libel-  
ants therein named. [10]

III.

That the second alleged cause of action in said

libel, set forth in paragraphs V, VI, VII, VIII and IX thereof, does not state facts sufficient to constitute a cause of action against this defendant, in favor of any of the libelants therein named.

## IV.

That this Court has no jurisdiction of the subject matter of either of the causes of action alleged in said libel.

Wherefore, defendant prays that said libel may be dismissed, with costs to this defendant.

PILLSBURY, MADISON & SUTRO,  
A. E. ROTH,

Attorneys for Defendant.

[Endorsed]: Filed Nov. 16, 1918. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [11]

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*In the Southern Division of the United States District Court, for the Northern District of California, First Division.*

IN ADMIRALTY—No. 16,462.

FRANK ALIOTO et al.,

Libelants,

vs.

L. A. PEDERSEN,

Defendant.

**Opinion and Order Sustaining Exceptions to Libel.**

H. W. HUTTON, Esq., Proctor for Libelants.

PILLSBURY, MADISON & SUTRO, and A.  
ROTH, Esq., Proctors for Defendant.

Libelants are seamen and fishermen who worked

as such for respondent in Alaska. They have two causes of complaint: First,—that respondent could not handle more than 1,200 salmon per day of twenty-four hours, while they could have caught 1,500 within that period, and second,—that respondent did not credit them with a sufficient number of additional salmon, because of delay in unloading their boats.

It appears from the libel that respondent was by the terms of the contract empowered to limit the number of salmon that he was bound to pay for to 1,200 in each twenty-four hours. That number apparently he did receive and pay for. It is not averred that libelants caught and tendered to him at any time any greater number than this, but it is averred that if he had been prepared with the number of beachmen that he had agreed to furnish he would have been able to take 1,500, which they could have caught. But as he was authorized to limit the catch to 1,200 and apparently did so, [12] the fact that he could not handle more, or that libelants could have caught more becomes immaterial, and no recovery can be had for the uncaught fish.

The contract provided further that each boat detained from delivering salmon for more than six hours should be credited with 25% additional salmon over the number delivered from it, and for each further hour's delay, an additional credit of 25% should be given. The libel avers that the boats were detained from delivering for twenty-four hours, and should have been credited with 5,700 additional salmon, whereas they were in fact credited with only 1,200. But by this detention they were prevented

from fishing for but twenty-four hours, and for that period they were credited with 1,200 salmon, the total number that they could have received pay for had they had not been prevented from fishing.

The contract cannot reasonably be so construed as to allow them nearly five times as many salmon in the twenty-four hours during which they were prevented from fishing, as they could have been paid for had they worked.

I do not think the libel discloses any undischarged liability on the part of respondent, and the exceptions will therefore be sustained.

January 15, 1919.

M. T. DOOLING,  
United States District Judge.

[Endorsed]: Filed Jan. 15, 1919. W. B. Maling,  
Clerk. By Lyle S. Morris, Deputy Clerk. [13]

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At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Wednesday, the fifteenth day of January, in the year of our Lord, one thousand nine hundred and nineteen.

No. 16,462.

FRANK ALIOTO et al.

vs.

L. A. PEDERSEN.

**Minute Order Sustaining Exceptions to Libel.**

Pursuant to order this day filed, it is ordered that exceptions to libel filed herein be and the same are hereby sustained. [14]

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*In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.*

IN ADMIRALTY—No. 16,462.

FRANK ALIOTO et al.,

Libelants,

vs.

L. A. PEDERSEN,

Defendant.

**Final Decree.**

Defendant's exceptions to the libel in the above cause, having been sustained, and libelants declining to amend their said libel, it is hereby ordered that said libel be and the same is hereby dismissed, with costs, to the defendant.

Dated February 25, 1919.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Feb. 25, 1919. W. B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.

Entered in Vol. 8, Judg. and Decrees, at page 435.

*In the Southern Division of the District Court of the  
United States, in and for the Northern District  
of California, First Division.*

IN ADMIRALTY—No. 16,462.

FRANK ALIOTO et al.,

Libelants,

vs.

L. A. PEDERSEN,

Defendant.

**Notice of Appeal.**

The defendant above named and his proctors will please take notice: That libelants in said above-entitled cause hereby appeal to the United States *Circuit of Appeals* for the Ninth Circuit, from the final decree rendered, given and made in said cause on the 26th day of February, 1919, and from each and every part and the whole of said decree.

To the Defendant Above Named and to Messrs. Pillsbury, Madison & Sutro and A. E. Roth, Esqs., Proctors for Defendant.

Yours etc.,

H. W. HUTTON,  
Proctor for Libelants.

[Endorsed]: Copy of the within Notice of Appeal received this 1st day of March, 1919.

A. E. ROTH,  
PILLSBURY, MADISON & SUTRO,  
Proctors for Defendant.

Filed Mar. 1, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

*In the Southern Division of the District Court of the United States, for the Northern District of California, First Division.*

IN ADMIRALTY—No. 16,462.

FRANK ALIOTO et al.,

Libelants,

vs.

L. A. PEDERSEN,

Defendant.

### **Assignment of Errors.**

#### **I.**

The Court erred in finding and deciding that defendant was empowered under the terms of the contract to limit the number of salmon that he was bound to pay for to 1,200 in each twenty-four hours.

#### **II.**

The Court erred in not finding and deciding that defendant was bound under the terms of the contract of hiring to employ no less than three beachmen for every line of canning machinery for tall cans operated by him.

#### **III.**

The Court erred in not finding and deciding that defendant was bound to comply with all of the terms of the contract of hiring set forth in the libel in order to allow each of the libelants a maximum catch of salmon.

#### **IV.**

The Court erred in finding and deciding that

what the Court found as defendant's right to limit the amount of salmon that he was required to take under the contract of hiring to 1,200 each twenty-four hours rendered noneffective the parts of said contract of hiring that required him to employ no less than three beachmen for each line of canning machinery operated by him.

#### V.

The Court erred in finding and deciding that the following language [17] in the contract of hiring set forth in the libel herein, to wit:

“If any boat is detained from delivering salmon at receiving station for six hours after arrival, such boat shall be credited with twenty-five per cent (25%) additional salmon over and above the number delivered from it, and for each further hour's delay, an additional credit of twenty-five per cent (25%) shall be given. Boats to report at time of arrival at receiving station. This same rule to apply when boats are on the limit. Boats must have nets cleared before arriving at fish receiving station.”

—could not be so construed as to allow libelants to be credited with the amount of salmon the language of said part of contract of hiring says they shall be credited with.

#### VI.

The Court erred in not finding and deciding that the said language in said contract of hiring was intended by the parties thereto to be and was liquidated damages and the measure of defendant's liability for a breach thereof.

## VII.

The Court erred in not finding and deciding that if the said damages set forth in said part of said contract of hiring was a penalty that the amount of damages suffered by each of the libelants by a breach thereof was a subject matter for proof.

## VIII.

The Court erred in the absence of proof in finding and deciding that no one of the libelants could recover from defendant for a breach by him of said part of said contract of hiring in excess of 1,200 salmon and the value thereof for each twenty-four hours they were detained from delivering salmon.

## IX.

The Court erred in arbitrarily fixing the damages suffered by each of the libelants for detention in delivering salmon as alleged in their libel to 1,200 salmon in each twenty-four hours, in the absence of proof as to what the actual damage was.

## X.

The Court erred in finding and deciding that in no event could [18] any of the libelants be credited with more than 1,200 salmon for the detention complained of in their libel herein.

## XI.

The Court erred in not finding and deciding that defendant was bound by the measure of damages set forth in said contract of hiring as set forth herein and shown in libelant's libel.

## XII.

The Court erred in sustaining the first exception of defendant to libelants' libel, and also in sustain-

ing the second of such exceptions.

## XIII.

The Court erred in finding and deciding that libelants' libel did not state a cause of action.

## XIV.

The Court erred in finding in effect that a breach by defendant of that part of the contract of hiring set forth in the libel, that required him to employ three beachmen for each line of canning machinery operated by him was immaterial.

## XV.

The Court erred in not giving full effect to all of the parts of said contract of hiring, and in finding and deciding that one part of said contract not in conflict with another part rendered that other part of no force and effect.

## XVI.

The Court erred in not overruling each of the exceptions filed by defendant to libelants' libel herein.

H. W. HUTTON,

Proctor for Libelants.

[Endorsed]: Copy received this 19th day of March, 1919.

PILLSBURY, MADISON & SUTRO,

Proctors for Defendant.

Filed Mar. 20, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [19]

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[Endorsed]: No. 3320. United States Circuit Court of Appeals for the Ninth Circuit. Frank Alioto et al., Appellants, vs. L. A. Pedersen, Appel-

lee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Received March 20, 1919.

F. D. MONCKTON,  
Clerk.

Filed March 29, 1919.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

IN ADMIRALTY.

FRANK ALIOTO et al.,  
Libelants and Appellants,

vs.

L. A. PEDERSEN,  
Defendant and Appellee.

**Designation of Appellants Under Rule 23.**

Appellants designate the following parts of the record on appeal herein upon which they intend to rely, and which they think necessary to be printed for the consideration thereof to wit:

1. The libel.
2. The exceptions to the libel.

3. The minute order sustaining the exceptions to the libel.
4. The decree.
5. The assignments of error.
6. The notice of appeal.

H. W. HUTTON,  
Proctor for Appellants.

[Endorsed]: No. 3320. In the United States Circuit Court of Appeals for the Ninth Circuit. In Admiralty. Frank Alioto et al., Appellants, vs. L. A. Pedersen, Appellee. Designation of Parts of Record Which Appellants Think it Necessary to Print. Filed Apr. 2, 1919. F. D. Monckton, Clerk.

Copy received this 29th day of March, 1919.

PILLSBURY, MADISON & SUTRO,  
E. A. ROTH,  
Proctors for Appellee.